The High Contracting Parties to the Hague Convention for the Protection of Cultural Property In the Event of Armed Conflict announced that they were ‘convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world’. This bold statement appears to enshrine the principle that cultural property, wherever located and by whomever made, is part of a valuable common heritage of humankind.

It follows that cultural property is therefore deserving of protection by all humankind, and this should be the important value underpinning the Articles of the Conventions and Protocols. This conclusion is further supported in the preamble, which goes on to say that ‘the preservation of the cultural heritage is of great importance for all peoples of the world and [...] it is important that this heritage should receive international protection’.

The expression ‘all peoples of the world’ combines with ‘all mankind’ to suggest that the preamble intends not only all those people currently inhabiting the world, but also all those as yet unborn, for whom the Convention urges the protection of cultural property.

It follows from the preamble that to diminish such cultural property must be to diminish the common good of all humankind. Accordingly, any attack upon, destruction of or damage to such property must be an act against the common good of all humankind. One would assume, then, that cultural property would not be treated in statute as something that can be aligned with any one party to a conflict under an adversarial or partisan model. Rather, cultural property ought to be treated as more akin to a neutral party or an ‘innocent bystander’: in human terms, perhaps a person described in Common Article 3 of the Geneva Conventions. These persons are protected against, inter alia, ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’ and ‘taking of hostages’. It would follow, then, that unlawful use, by a party to a conflict, of cultural property – such as use for military purposes – ought not to result in the removal of protection from that cultural property, but rather that that protection ought to be maintained. Just as a person taken hostage does not become a legitimate target for the opposing Party, so cultural property appropriated by a Party to armed conflict ought not to lose its protected status.

Similarly, if an item of cultural property is to be considered part of ‘the cultural heritage of all mankind’, its protection ought not to be dependent on the disposition with regard to statutes protecting cultural property of the State Party in whose territory it happens to be located. These assumptions appear to be inherent in the broad statements of the preamble to the Hague Convention.

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1 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 [Hague]: Preamble. Available at http://www.icomos.org/hague/ [accessed 25 February 2011]. It is of particular interest to note that the Federal Republic of Yugoslavia was one of the four first States Parties to ratify the protocol, a point which will be of relevance to the discussion of the shelling of Dubrovnik later in this paper.

2 ibid.

I have described the apparent attitude to cultural property revealed in the *Hague Convention*’s preamble. The Articles of that *Convention*, though, appear to reflect a somewhat contradictory view. Much of the *Hague Convention* supports the tenor of the preamble. For example, Article 7 requires High Contracting Parties to foster respect for cultural property in their armed forces.\(^4\) Article 28 requires High Contracting Parties to prosecute and sanction persons who breach the *Convention*.\(^5\) Article 4 requires respect for cultural property, including not directing acts of hostility against it and not using it for purposes which are likely to expose it to damage.\(^6\)

By contrast, though, Article 4 also permits the use of cultural property for purposes that are likely to expose it to damage or destruction, or an act of hostility against cultural property, if ‘military necessity imperatively requires’ such action.\(^7\) One might hope that an imperative requirement would be a very exceptional, and therefore rare, occurrence. However, the term is not defined within the statute and there does not appear to be any caselaw attempting to define or test the notion of imperative requirement with reference to cultural property. It seems, therefore, that the need to protect cultural property, which is part of the ‘cultural heritage of all mankind’, may be subordinated to the imperative requirements of military necessity for an individual High Contracting Party.

Article 18 dictates that High Contracting Parties are bound by the *Hague Convention* in their mutual relations and in relations with any Power that accepts and applies its provisions.\(^8\) By implication, Article 18 excuses High Contracting Parties from abiding by the *Convention* in their relations with Powers that do not accept the *Convention*. The implication is that cultural property whose ‘owner’ is not a High Contracting Party to the *Convention* is not protected. That is, in contrast to the preamble where all cultural property contributes to ‘the culture of the world’ and should be valued accordingly, it appears that in Article 18 cultural property that does not ‘belong’ to a High Contracting Party does not warrant respect and is of no significant value.

In the Articles of the *Hague Convention*, the universalist approach espoused by the preamble, avowing a need to consider cultural property outside the paradigm of individual States and their imperatives, is replaced by a partisan or adversarial approach, where the protection of cultural property is subordinated to the military interests of States, and cultural property is treated as the property of individual States rather than as the common heritage of humankind.

*Protocol II* to the *Hague Convention* introduces proportionality to the consideration of cultural property. Article 7 requires a Party to cancel or suspend an attack only where incidental damage to protected cultural property ‘would be excessive in relation to the concrete and direct military advantage anticipated’. Similarly, a Party must refrain from deciding to launch an attack where the damage to protected cultural property would be disproportionate.\(^9\)

Article 53 of Additional Protocol I and Article 16 of Additional Protocol II deal briefly with the protection of cultural property. Although the text is concise and contains no ideological statements comparable to the Hague Convention’s preamble, the provisions of these two Articles appear to extend a higher level of protection to cultural property than that afforded by the Hague Convention. Here, there are no conditions imposed. There is a direct and unqualified prohibition on ‘acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’. It is also prohibited to ‘use them in support of the military effort’. There is no suggestion in either Article that any aspect of this prohibition might be mitigated or withdrawn in response to a Party’s non-contracting or breaching of the Protocol. These Articles appear to be a step closer to the intent of the Hague Convention’s preamble than are the Articles in the Hague Convention itself or its Protocol.

There seems therefore to be a distinct divergence between the Hague and Geneva in the matter of cultural property. On the one hand, the Hague preamble states a laudable and idealistic position, yielding to a more pragmatic and partisan approach in the Articles, and finally reducing the issue to one of proportionality and military convenience in Protocol II. On the other hand, the Geneva Additional Protocols appear to extend unconditional protection to cultural property, albeit with little guidance as to implementation.

To illustrate how cultural property is protected in practice, I shall consider the indictments in the International Criminal Tribunal for the former Yugoslavia for the shelling of the World Heritage Site of Dubrovnik in December 1991. I will examine four particular cases: those of Slobodan Milosevic, Pavle Strugar, Miodrag Jokic and Vladimir Kovacevic. The latter three were alleged to have direct involvement in the shelling of Dubrovnik, being stationed in the immediate area at the time. The indictments against them refer only to Dubrovnik, although ‘destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’ is not the only crime for which any of the three was indicted. Milosevic, on the other hand, was indicted on 32 counts covering alleged incidents ranging widely over time and place, resulting effectively from his presidency of the Republic of Serbia and his consequent authority over the Serbian armed forces. While Milosevic’s trial proceedings were terminated before judgement was made, it is noteworthy that amongst the numerous indictments for war crimes and crimes against humanity, including very large numbers of civilian deaths, the damage to cultural property in Dubrovnik was considered sufficiently serious to be given a place.

Pavle Strugar was found to have had legal and effective control of the Serbian forces who conducted the attack on Dubrovnik, and not to have exercised that control to prevent or

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(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) to use such objects in support of the military effort;
(c) to make such objects the object of reprisals’.

11 The World Heritage Site is generally referred to as the Old Town, or occasionally the Old City. In this paper, I refer to it simply as Dubrovnik, since I do not discuss the wider geographical area which is also known as Dubrovnik.

discontinue the attack, which lasted for over ten hours, or to take disciplinary action after the event. He was indicted on six counts: murder; cruel treatment; attacks on civilians; devastation not justified by military necessity; unlawful attacks on civilian objects; and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science.\textsuperscript{13} The Trial Chamber concluded that, at the time of the attack, Dubrovnik was recognisable as a cultural heritage site under protection, not merely because of its renown as a World Heritage Site which was clearly delineated and recognisable by its medieval city walls, but also because it was marked with the international emblem assigned for the identification of protected cultural property. The Trial Chamber further found that Dubrovnik was occupied by civilians, and was not being used, nor could it have reasonably been thought to have been being used, for military purposes.\textsuperscript{14}

Strugar was found guilty by the Trial Chamber on only two of the six counts: attacks on civilians and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. Each of the other counts was held to be not materially distinct from one of these and so ineligible for a finding of guilt.\textsuperscript{15} The rather surprising finding that ‘destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’ is not materially distinct from ‘devastation not justified by military necessity’ has implications for the interpretation of the cultural property protections. It is certainly true that in the case of Dubrovnik some facts – that the attack was proven to have taken place, and that Strugar had responsibility, for instance – were equally applicable to both counts. However, it was also necessary to establish on the one hand the fact that cultural property had been damaged, and on the other the fact that military necessity was not a justification. Each of these two facts is applicable to only one of the counts.

The Appeal Chamber, in a majority ruling, in fact decided that guilt could be found on four of the six counts, distinguishing the three counts concerning objects from each other.\textsuperscript{16} This finding of course supersedes that of the Trial Chamber, but it is interesting that the Trial Chamber judges were prepared to take the position they did.

Although Strugar had surrendered himself to the ICTY, he had pleaded not guilty to the charges, and had mounted an extensive defence, including suggestions that the damage to Dubrovnik had been deliberately caused by Croatians and that the Serbian forces had been fired on from within Dubrovnik. The Trial Chamber had rejected both of these suggestions as without foundation. Strugar had submitted that he had expressed his regret for the incident on the following day, but the Trial Chamber had not accepted this as ‘an expression of sincere remorse’.\textsuperscript{17} Strugar made a statement to the Trial Chamber stating, amongst other things, that he was sorry that he had been ‘unable to do anything to stop and prevent all that suffering’.\textsuperscript{18}

\textsuperscript{14} \textit{ibid} at p 140.
\textsuperscript{15} \textit{ibid} at p 188.
\textsuperscript{17} Strugar \textit{Trial Judgement}, at p 194.
\textsuperscript{18} Strugar \textit{Trial Judgement}, at p 195.
The Trial Chamber, however, found that he had had the power to prevent the attack on Dubrovnik.

The Trial Chamber sentenced Strugar to eight years’ imprisonment. In sentencing, the Trial Chamber noted that the ‘primary objectives of sentencing have been identified by the Appeals Chamber as retribution and deterrence’. At the time of sentencing, Strugar was 71 years old and in poor health. The question arises as to whether a total sentence of eight years’ imprisonment for two offences is sufficient deterrence to afford adequate protection to cultural property in armed conflict. It seems a fairly minor deterrent.

The Trial Chamber noted that the Socialist Federal Republic of Yugoslavia Criminal Code provided for a minimum of only one year’s imprisonment for cultural property infringements. This is particularly interesting in light of Yugoslavia’s prompt ratification of the Hague Convention some 50 years earlier, and indicates a distinct change of position in Yugoslavia on cultural property over the intervening period. It is also interesting that, while Croatia, Slovenia and Bosnia-Herzegovina notified succession to the Hague Convention in the early 1990s, Serbia only did so much more recently, in 2001.

In what might be viewed as a diminution of the deterrent value of Strugar’s sentence, the Appeals Chamber found guilt on four counts, and reduced the sentence to seven and a half years, so that while there were more counts to be punished, the sentence was lessened.

Vladimir Kovacevic was indicted on the same six counts: murder; cruel treatment; attacks on civilians; devastation not justified by military necessity; unlawful attacks on civilian objects; and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. It was alleged that Kovacevic was the battalion commander responsible for the forces that carried out the shelling of Dubrovnik. Kovacevic was arrested in Serbia and made an initial appearance before the ICTY. He was ruled unfit to stand trial on the basis of mental health. At the age of 47, Kovacevic is the only one of those indicted for the Dubrovnik attack who has any prospect of living long enough to serve a sentence of imprisonment which might offer some deterrence to Parties contemplating cultural property offences. It seems unlikely, though, that he will ever be brought to trial.

Miodrag Jokic was also indicted on the six counts of murder; cruel treatment; attacks on civilians; devastation not justified by military necessity; unlawful attacks on civilian objects; and destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. He appeared before the ICTY two days after his surrender and pleaded not guilty to all charges.

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19 Strugar Trial Judgement, at p 190.
20 ibid, at p 474.
22 Strugar Appeal Judgement.
However, just under two years later he pleaded guilty to all charges. There was thus no trial in the matter, and so the evidence was not presented or tested. It seems likely that the evidence in the Strugar trial canvassed much the same material, however.

Jokic was apparently the first indicted Serbian officer to surrender to the ICTY. It was undoubtedly a difficult thing to do, and the internet still bears traces of his vilification by his fellow-Serbs. He made a statement to the court that two people were killed, three people were wounded and substantial damage was caused to civilian structures and to cultural and historical monuments in the old town of Dubrovnik. The fact that these lives were lost in the area for which I was responsible will remain etched in my consciousness for the rest of my life. I am ready to bow before all the victims of this conflict, regardless of the side they were on, with the dignity of a soldier. Furthermore, although I had already done that in the course of the shelling itself over the radio, and afterwards I did it again in person, I feel the obligation to express my deepest sympathy to the families of those who were killed and wounded and the citizens of Dubrovnik for the pain and all the damage that was caused to them by the unit under my command. I see my regret as a prerequisite for reconciliation and the coexistence of various peoples in this area.

The possibility of self-interest must be conceded when considering this statement, but nonetheless it seems very important to acknowledge the apparent regret, understanding and wish for reconciliation that it embodies.

In sentencing, the trial chamber took into account Jokic’s apparently sincere remorse as a mitigating factor, together with his guilty plea, cooperation with the prosecution and general good conduct. Jokic was sentenced to a total of seven years’ imprisonment for the six counts. He appealed the sentence, but the appeal was dismissed. His term of imprisonment was therefore approximately equivalent to that of Pavle Strugar.

The experience in the former Yugoslavia is clearly that cultural heritage is not adequately protected in armed conflict. There have been very few sentences delivered: Jokic and Strugar appear to be the only two for the ICTY that do not have a specifically religious focus. Neither of them would appear particularly powerful as deterrents. The net legal outcome to date of cultural property prosecutions by the ICTY is the imprisonment for seven years each of two septuagenarians. This is set against not only the irreversible damage and destruction to the 800-year-old World Heritage Site of Dubrovnik, but also the destruction of such important cultural property as the Sarajevo National Library with its irreplaceable collections and countless other items of cultural property throughout the former Yugoslavia.

25 ibid.
27 Jokic Case Information Sheet, at p 4.
28 The conviction of Dario Kordic included the count of destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. This related specifically to the destruction of mosques, which, although certainly susceptible to a similar analysis to the foregoing, was clearly a manifestation of the attack on the Muslim faith of the target population. International Criminal Tribunal for the Former Yugoslavia, Prosecutor v Dario Kordic and Mario Cerkez IT-95-14/2: Case Information Sheet. Available at http://www.icty.org/x/cases/kordic_cerkez/cis/en/cis_kordic_cerkez_en.pdf [accessed 25 February 2011].
29 See, for example, Munevera Zeco, ‘The national and university library of Bosnia and Herzegovina during the current war’, Library Quarterly, 66/3 (1996), 294-301.
Legal protection of cultural heritage cannot always be effective. It is hampered by the fundamental refusal of some belligerents to acknowledge the underlying principle of the preamble to the *Hague Convention*. Just as those Parties guilty of ethnic cleansing and genocide do not acknowledge the rights of certain peoples to be considered part of humankind, it would be inconsistent for them to acknowledge that such peoples’ cultural heritage is part of the shared cultural heritage of humankind. They are therefore unlikely to acknowledge the value of cultural property in these contexts, or to respect it. The deterrent value of sentencing for cultural property violations seems minimal, and unlikely to have any significant effect. A punitive law can hardly fulfil its intended purpose if there is a perception that those who break it can expect either immunity from prosecution or minimal punishment. Similarly, the equivocal protections afforded by * Protocol II* to the *Hague Convention* in particular do not send a strongly deterrent message.

There is, however, no particular reason to believe that a more powerful deterrent message would have a greater effect on strongly motivated Parties. The law has very limited power to protect cultural property whilst there remain irreconcilable differences in States’ and individuals’ conceptions of humanity and humankind. It is only when there is some form of common ground at this more fundamental level that the law can be empowered to fulfil the purpose for which it was conceived. It is for this reason that actions such as the statement by Miodrag Jokic to the Trial Chamber become important. It was the legal framework of the ICTY and the statutes it was established to enforce that made it possible for Miodrag Jokic to make his statement to the world, and so perhaps the law has an especially important role to play in this process, albeit not one with which it is traditionally associated. Perhaps what we should hope will be gained as a result of international law concerning cultural property is the opportunity, through such events as Jokic’s statement, of gradually altering attitudes, so that cultural property, from whomever’s past, takes a step closer to being part of everyone’s future.

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30 See, for example, the chilling recount from Rwanda by Martha Minow, ‘Education for coexistence’ in Antonia Chayes and Martha Minow (eds), *Imagine Coexistence* (Wiley, 2003), at p 213: ‘When he learned that a hospital sheltered several hundred children but was under control of the Hutus, he went to the Hutu leader in charge and asked to take the children and transfer them to a safer place. The leader said no. Dr Orbinski asked, “Do you have children?” “Why, yes,” the leader replied, proudly pulling out photos. The physician returned to the situation at hand, and said, “But these are children too.” The Hutu leader replied, “No, they are cockroaches.”’